RECEIVED

DEC 0 2 2002

GENERAL COUNSEL
OF COPYRIGHT

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re:	Docket No. 2002-1 CARP DTRA3
Digital Performance Right in Sound Recordings Rate Adjustment	Docket No. 2001-2 CARP DTNSRA
	Docket No. 2001-1 CARP DSTRA 2

JOINT RESPONSE TO PROPOSAL FOR SCHEDULING OF SECTION 112 AND 114 STATUTORY LICENSE PROCEEDINGS

Pursuant to a request for written comments published by the Copyright Office in the Federal Register on November 20, 2002, 67 Fed. Reg. 70093, and similar requests set forth in orders issued by the Copyright Office on November 13, 2002 in Docket Nos. 2001-1 CARP DSTRA2 and 2001-2 CARP DTNRSA, the Recording Industry Association of America, Inc. ("RIAA"), the American Federation of Television and Radio Artists ("AFTRA") and the American Federation of Musicians of the United States and Canada ("AFM") (collectively, "Copyright Owners and Performers"), provide these comments concerning the scheduling of the three above-captioned separate copyright arbitration royalty panel ("CARP") proceedings for the section 112 and 114 statutory licenses.

I. Introduction

Copyright Owners and Performers agree with the Copyright Office that CARP schedules should ensure that rates are set as soon as reasonably possible to provide all parties with business certainty.[1] This maxim should be carefully balanced with the equally important goals of providing sufficient time for parties to negotiate settlements as intended by Congress and avoiding unnecessary legal expenses. In addition, any scheduling order must take into account issues of fundamental fairness and the right of parties to be represented by counsel of their choice. As discussed more fully below, these objectives dictate a modest delay in commencing each of the CARP proceedings at issue here.

RIAA is currently in negotiations with preexisting subscription services, preexisting satellite digital audio radio services ("SDARS"), eligible nonsubscription services, new subscription services and business establishment services. Most, if not all, of these negotiations did not begin until the conclusion of the recent webcasting CARP because many of the same parties or issues were involved. Therefore, additional time is necessary to give the parties a full opportunity to negotiate.

We note that the schedules proposed below are predicated on statutory licensees continuing to pay at existing rates subject to retroactive adjustments. If licensees are permitted to cease making payments at the end of every statutory license period pending a new rate determination, then Copyright Owners and Performers would effectively be forced to give repeated interest-free loans to entire classes of services (some of whom already enjoyed a four-year, interest-free loan) until new rates can be set. While

[1] We note, however, that the schedule established in the Copyright Act and the implementing regulations does not appear to provide a mechanism for users to obtain notice of the statutory royalty rates in advance of a given license period. Even if arbitration proceedings were convened on the first day of a given license period, the relevant statutory and regulatory provisions, see, e.g., 17 U.S.C. §§ 802(e) and (f), 803; 37 C.F.R. §§251.45(b)(2) and (c), 251.53, 251.56 – 251.58, 251.63, do not contemplate a decision from the Librarian any earlier than September of the same year – at least nine months after the start of the license period. Moreover, to get a decision as early as September of the first year of the license period, direct cases would have to be due the previous year (i.e., during the final year of the prior license period), before the Office has even identified all parties to the proceeding.

Copyright Owners and Performers believe that the statute does not permit statutory licensees to cease making payments, we note this issue here not to argue the merits but rather to emphasize that Copyright Owners and Performers might not support delays in commencing the above-referenced CARPs if licensees took a contrary position on the payment issue.

II. The Proceeding to Adjust the Rates and Terms for the Preexisting Subscription Services and to Establish Rates and Terms for the Preexisting Satellite Digital Audio Radio Services, Docket No. 2001-1 CARP DSTRA2, Should Proceed According to the Schedule Proposed by the Parties.

In the case of the preexisting subscription services/preexisting satellite digital audio radio services proceeding, Docket No. 2001-1 CARP DSTRA 2 (hereinafter, the "Preexisting Services Proceeding"), six of the seven parties[2] to the proceeding have petitioned the Copyright Office to postpone the commencement of the proceeding.[3] The parties filed a joint request for an extension in order to give themselves adequate time to negotiate a voluntary resolution to this proceeding. Although the settlement negotiations are proceeding on two tracks, one with the preexisting subscription services and one with the preexisting satellite digital audio radio services, the parties to both negotiations have committed themselves to negotiating intensively so that all avenues to an agreement can be explored before either side begins the expensive task of preparing its direct case.

The parties believe it would be both inefficient and counterproductive to begin preparing direct cases while productive negotiations are ongoing. After reconsidering the extension request in light of the issues raised by the Copyright Office, Copyright Owners

[2] Although there are a total of eight entities that will be bound by the rates and terms established in the Preexisting Services Proceeding, one of those entities, Muzak, did not file a Notice of Intent to Participate in the proceeding and is not, therefore, a party to the proceeding.

[3] To the best of our knowledge, the remaining party has not objected to the proposed extension of time.

and Performers remain convinced that a March 20, 2003 deadline for filing direct cases is necessary in order to give the parties sufficient time to complete meaningful negotiations and prepare direct cases, if necessary. Given the limited universe of parties involved in this proceeding, RIAA hopes to negotiate solutions that will eliminate the need for this proceeding or at least narrow its scope substantially.

Even if a negotiated solution cannot be reached, granting the extension requested by the parties to the Preexisting Services Proceeding will not give rise to any significant uncertainty. A rate for the preexisting subscription services was established in 1998 by order of the Librarian of Congress. See 63 Fed. Reg. 25394 (May 8, 1998). As noted in the Introduction, Copyright Owners and Performers assume that those services are required to continue making payments at that rate, subject to retroactive adjustments, until a new rate is set.

Although no rate has yet been set for the SDARS, the lack of a rate has not deterred these services from raising hundreds of millions – if not billions – of dollars in the capital markets nor from launching their services on a nationwide basis. Moreover, there is no reason that the SDARS cannot develop reasonable estimates concerning a range of likely royalty rates and to escrow a license fee reserve.

Most importantly, by filing the joint request to postpone commencement of the proceedings, the parties (all of whom are represented by counsel) have effectively agreed to the appropriate timeframe for receiving notice of the applicable royalty rate. The Copyright Office should respect the parties' right and ability to reach such a decision and grant their extension request. Cf. Order in Docket Nos. 2001-1 CARP DSTRA 2, 2001-2 CARP DTNRSA (January 28, 2002) ("On CARP matters such as consolidating proceedings, the views of the parties to the proceedings receive greater weight than those of non-parties.")

III. The Proceedings to Adjust the Rates and Terms for Eligible Nonsubscription Services, Docket No. 2002-1 CARP DTRA 3, and Establish Rates and Terms for New Subscription Services, Docket No. 2001-2 CARP DTNSRA, Should Not be Scheduled Until After the D.C. Circuit Rules on the Pending Appeal.

Notwithstanding the Copyright Office's desire to announce rates and terms for a given period as early as reasonably possible (a principle with which we generally agree), Copyright Owners and Performers believe that it would be unwise to schedule proceedings for eligible nonsubscription services and new subscription services before the D.C. Circuit issues its decision on the currently pending, consolidated appeals from the Librarian's final rule and order establishing rates and terms for eligible nonsubscription services (i.e., webcasters and simulcasters) and for business establishment services operating under the Section 112(e) ephemeral license. See IOMedia Partners, Inc. v. Librarian of Congress, Consolidated Nos. 02-1244, 02-1245, 02-1246, 02-1247, 02-1248 and 02-1249 (D.C. Cir. filed Aug. 7, 2002) *appealing* Final Order of Librarian of Congress in Docket No. 2000-9 CARP DTRA 1 & 2, 67 Fed. Reg. 45240 (July 8, 2002).

Because the proceedings to adjust and determine rates and terms for eligible nonsubscription services and new subscription services are governed by the same legal standard (i.e., willing buyer, willing seller) and are likely to involve a number of the same parties, the D.C. Circuit opinion will necessarily bear on issues relating to the rates for eligible nonsubscription services, Docket No. 2002-1 CARP DTRA3, as well as rates for new subscription services, Docket No. 2001-2 CARP DTNSRA. Given this, Copyright Owners and Performers believe it would be inefficient for the parties, arbitrators and the

Office to spend time and money preparing cases, deciding motions and holding hearings until such time as important legal issues that may affect both proceedings are resolved by the D.C. Circuit. A decision to schedule these two proceedings before the D.C. Circuit rules could result in a situation where the parties' briefs have to be rewritten and refiled, preliminary decisions of the Copyright Office and/or the panel have to be modified or reversed and, in the worst case scenario, could result in a situation where one or both proceedings have to be conducted anew because of precedents established by the D.C. Circuit after the conclusion of one or both proceedings. All parties are entitled to the benefit of the Court's opinion on these contested issues in preparing their direct cases. Moreover, parties should not be required to relitigate issues that may be resolved by the Court of Appeals.[4]

Delaying the start of these proceedings would have the added benefit of giving the parties additional time to reach negotiated solutions that would eliminate the need for these proceedings. RIAA is actively involved in negotiations with the Digital Media Association ("DiMA") to reach a voluntary agreement that includes rates for commercial webcasters as well as new subscription services. Both sides are committed to these negotiations, as evidenced by their participation in recent negotiating sessions and their mutual agreement to hold additional negotiating sessions in the near future. RIAA is also

[4] Such a situation would not be unlike the situation that occurred when the Copyright Royalty Tribunal ("CRT") refused to delay the start of both the 1979 and 1980 cable royalty distribution proceedings, Docket Nos. CRT 80-4, 47 Fed. Reg. 9879 (March 8, 1982), CRT 81-1, 48 Fed. Reg. 9552 (March 7, 1983), pending resolution by the D.C. Circuit of separate appeals from the CRT's 1978 and 1979 cable royalty distribution decisions. See Nat'l Ass'n of Broadcasters v. CRT, 675 F.2d 367 (D.C. Cir. 1982); Christian Broadcasting v. CRT, 720 F.2d 1295 (D.C. Cir. 1983). Primarily as a result of the CRT's refusal to delay the proceedings, the Copyright Owners were forced to bear the expense of participating in three separate proceedings, including remand proceedings, related to the appeal of the 1979 decision.

actively involved in negotiations with business establishment services to adjust the rate applicable to their use of the Section 112 ephemeral license.

Now that the Small Webcasters Settlement Act of 2002, H.R. 5469, has provided a framework to address the concerns of small commercial webcasters and noncommercial webcasters, settlements with DiMA and the business establishment services would eliminate the need for a proceeding to establish rates and terms for new subscription services and would leave only the broadcasters/simulcasters as potential participants in a proceeding to adjust rates and terms for eligible nonsubscription services, which would, at a minimum, greatly simplify the nature of that proceeding. Under these circumstances, we are hopeful that a negotiated agreement with the broadcasters/simulcasters would be possible, making it likely that the eligible nonsubscription services proceeding could be eliminated as well.

Even if a negotiated solution cannot be found that eliminates both of these proceedings in their entirety, delaying the proceeding to adjust the rates for eligible nonsubscription services, Docket No. 2002-1 CARP DTRA3, will not give rise to any significant uncertainty. Rates for these services were established on July 8, 2002 for the period October 28, 1998 through December 31, 2002 by order of the Librarian of Congress. See 67 Fed. Reg. 45240 (July 8, 2002). As noted above, Copyright Owners and Performers assume that those services are required to continue making payments at those rates, subject to retroactive adjustments, until new rates are set.

The new subscription services are in a similar position to the SDARS. Although no rate has yet been set for these services, the lack of a rate has not deterred multiple companies from launching new subscription services. Further, apart from Music Choice, which filed a petition requesting that the Copyright Office convene a CARP to determine a royalty rate applicable to new subscription services[5] but subsequently withdrew that petition because its Backstage Pass subscription service ceased operating,[6] no other new subscription service (nor, presumably, any other service's investors) was concerned enough about rate certainty to file a petition requesting that a CARP be convened to determine a rate applicable to its service and only two services want a rate badly enough to be willing to participate in a CARP.[7] Moreover, the new subscription services can use the rates established for eligible nonsubscription services, preexisting subscription services, and business establishment services operating under the Section 112 license to develop reasonable estimates concerning a range of likely royalty rates and to escrow a license fee reserve.

Another important reason to postpone the proceedings to adjust the rates for eligible nonsubscription services, Docket No. 2002-1 CARP DTRA3, and to determine a rate for new subscription services, Docket No. 2001-2 CARP DTNSRA, until after the D.C. Circuit rules is to ensure that those proceedings are not scheduled to begin too close to the date the parties have proposed for the start of the Preexisting Services Proceeding. As described more fully in Section IV below, any schedule that sets the various proceedings too close together would pose a severe hardship for Copyright Owners and Performers.

---

[5] See Petition to Convene Copyright Arbitration Royalty Panel and to Consolidate Proceedings, filed October 11, 2001.

[6] See Motion to Withdraw, filed December 13, 2001.

[7] Aside from RIAA, AFM and AFTRA, only RealNetworks, Inc. and Yahoo! filed Notices of Intent to Participate in the new subscription services proceeding as of the December 20, 2001 filing deadline.

IV. The Copyright Office Should Not Consolidate All of the Proceedings Into One Proceeding Nor Should It Schedule the Proceedings to Run Concurrently or in Close Succession to One Another as This Would Pose a Severe Hardship for Copyright Owners and Performers.

Any decision by the Copyright Office to consolidate all of the proceedings into one proceeding, to schedule separate proceedings that run concurrently or to schedule separate proceedings in rapid succession to one another would pose a severe hardship for Copyright Owners and Performers that would be both prejudicial and impracticable.

The Copyright Office previously considered a motion filed by Music Choice to consolidate two of the three proceedings at issue here, namely the Preexisting Services Proceeding, 2001-1 DSTRA2, and the proceeding to establish rates and terms for new subscription services, 2001-2 CARP DTNSRA, and concluded that consolidation of those two proceedings was unnecessary. See Order in Docket Nos. 2001-1 CARP DSTRA 2, 2001-2 CARP DTNRSA (January 28, 2002). The Office determined that consolidation was unnecessary due, in part, to the fact that the parties to the two proceedings were not the same (aside from the Copyright Owners and Performers) and due, in part, to the fact that both copyright owners and copyright users opposed consolidation of the proceedings. Id.

Copyright Owners and Performers remain opposed to consolidation for all of the reasons set forth in their Joint Opposition to Request for Consolidation filed on December 20, 2001 and the Copyright Owners and Performers Joint Reply Comments filed on January 22, 2002, copies of which are attached hereto as Exhibits A and B. As described more fully therein, consolidation is inappropriate because: the various proceedings are required to be decided under different legal standards; the proceedings will cover different periods of time; there is little, if any, overlap among the copyright users involved in the proceedings; and the services involved in the three proceedings at issue are involved in entirely different industries with different delivery models, different economic conditions, different consumer bases and different competitive landscapes.

Any effort to combine all of these disparate services into one proceeding will result in a proceeding that – like the consolidated webcasting proceeding – is unwieldy, confusing and extremely difficult to complete within the 180-day statutory arbitration period. Where these factors exist, the Copyright Office has previously determined that consolidation is not an option. See Order in Docket Nos. 99-6 CARP DTRA, 2000-3 CARP DTRA2 (December 4, 2000) ("If, in the view of the Library, a consolidated proceeding will be so complicated and involve significantly larger amounts of testimony and evidence than a single proceeding, then consolidation is not an option. The 180-day arbitration period can become very short where too much material is assembled through consolidation, as the Library has learned from certain prior proceedings.")

Because the three proceedings at issue here are governed by two different legal standards, a consolidated proceeding is likely to lead to a result that is prejudicial to all parties involved. In particular, evidence presented in a single consolidated proceeding under one legal standard and/or by one group of services will directly and/or indirectly contaminate the arbitrators' thinking about other groups of services and about the result to be reached under the competing legal standard.

A consolidated proceeding is also likely to be more expensive for all parties involved, as reflected in the consolidated webcasting proceeding, which was the most expensive arbitration proceeding in Copyright Office history. It is likely to be more expensive for the participating services because each service may feel compelled to brief each issue that arises in the consolidated proceeding, even issues that would not have arisen in a separate proceeding or issues not obviously germane to the particular service. In a similar vein, a consolidated proceeding will likely be more expensive for Copyright Owners and Performers because for each issue that arises they will have to respond to arguments made by the plethora of services involved in the consolidated proceeding, as opposed to the more limited number of services that would be involved in each individual proceeding. A consolidated proceeding would also be more expensive for both sides if services are forced into arbitration that might have been willing to settle with RIAA following the outcome of one (or even two) unconsolidated arbitration proceedings.

Further, any schedule that requires Copyright Owners and Performers to participate in three separate proceedings -- either simultaneously or in rapid succession to one another -- would be extraordinarily burdensome for Copyright Owners and Performers. In the case of simultaneous proceedings, Copyright Owners and Performers and their outside lawyers would be forced to prepare three separate direct cases[8] and prepare and respond to preliminary motions simultaneously. In the case of back-to-back proceedings, Copyright Owners and Performers and their lawyers would still be forced to prepare three separate direct cases nearly simultaneously and they would be required to prepare and respond to preliminary motions in one proceeding at the same time they were preparing their direct case(s) in the succeeding proceeding(s). The burden would

[8] Because the Preexisting Services Proceeding involves two distinct sets of services – preexisting subscription services and preexisting satellite digital audio radio services – and the eligible nonsubscription services proceeding involves at least two distinct sets of services – webcasters/simulcasters and business establishment services, RIAA will effectively be preparing at least five separate direct cases in connection with the three pending proceedings. If webcasters are separated into large commercial webcasters, small commercial webcasters and non-commercial webcasters, the number of direct cases RIAA will be required to prepare increases to seven.

continue through all phases of the proceedings, including the rebuttal phases, in which the need to prepare and present multiple cases to respond to distinct types of services could be even greater.

Either of these schedules would be extremely taxing for SoundExchange's small staff, which would be virtually unable to process and distribute royalties while preparing for three simultaneous or near-simultaneous proceedings. In addition, the effect of either of these schedules would be to deprive Copyright Owners and Performers of their choice in counsel. Copyright Owners and Performers would be forced to hire additional outside counsel in order to shoulder the burden outlined above. Such counsel may not have the knowledge of the issues and industries involved, therefore causing Copyright Owners and Performers to spend more money and possibly compromise their representation in the proceedings. The burdens of such a schedule on Copyright Owners and Performers and their outside attorneys would also place Copyright Owners and Performers at an unfair disadvantage vis-à-vis the other parties to these proceedings, most of whom will be involved in only one of the pending proceedings. Like a consolidated proceeding, concurrent proceedings could also cost both sides significant additional sums of money, if services are forced into arbitration that might have been willing to settle with RIAA following the outcome of one (or even two) reasonably spaced arbitration proceedings.

V. Summary and Proposed Scheduling Order

For all of the reasons stated above, Copyright Owners and Performers propose that the Copyright Office adopt a scheduling order that (a) establishes March 20, 2003 as the deadline for filing direct cases in the Preexisting Services Proceeding, Docket No. 2001-1 CARP DSTRA 2; (b) adopts the pre-controversy discovery schedule proposed in the Joint Motion For Extension Of Time To File Direct Cases And To Adopt A New Pre-Controversy Discovery Schedule filed on November 8, 2002; and (c) postpones a decision concerning the deadline for direct cases in the proceedings to adjust rates and terms for eligible nonsubscription services, Docket No. 2002-1 CARP DTRA 3, and to determine rates and terms for new subscription services, Docket No. 2001-2 CARP DTNSRA, until such time as the D.C. Circuit issues its decision on the consolidated appeal of IOMedia Partners Inc.

As stated at the outset of these comments, the schedule proposed above is predicated on statutory licensees continuing to pay royalties at existing rates subject to retroactive adjustments. Copyright Owners and Performers reserve the right to request a modified schedule should the situation with respect to royalty payments change in any material way. As noted above, Copyright Owners and Performers remain hopeful that all three of these proceedings will be resolved by voluntary agreement.

Respectfully submitted,

AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS

By: Ann Chaitovitz / ACM
Ann Chaitovitz
National Director of Sound Recordings
260 Madison Avenue
New York, NY 10016

Of Counsel:

Arthur Levine
FINNEGAN, HENDERSON,
FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005

AMERICAN FEDERATION OF
MUSICIANS OF THE UNITED STATES
AND CANADA

By: Patricia Polach / ACM
Patricia Polach
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005

RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.

By: Susan Munsat
Cary H. Sherman
Steven M. Marks
Susan Chertkof Munsat
Gary R. Greenstein
Recording Industry Association of
America, Inc.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-0101
Fax: (202) 775-7253

Of Counsel:

Robert Alan Garrett
Michele J. Woods
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Fax: (202) 942-5999

Dated: December 2, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Response to Proposal for Scheduling of Section 112 and 114 Statutory License Proceedings of the Recording Industry Association of America, Inc., the American Federation of Television and Radio Artists ("AFTRA") and the American Federation of Musicians of the United States and Canada ("AFM") has been served this 2nd day of December, 2002, by first class mail to the following persons:

Bruce G. Joseph
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006
Counsel for Sirius Satellite Radio

Chuck Walker
Muzak LLC
2901 Third Avenue
Suite 400
Seattle, Washington 98121

David R. Berz
Sandra M. Aistars
Weil, Gotshal & Manges LLP
1501 K Street, NW
Suite 100
Washington, D.C. 20005
Counsel for DMX/AEI Music

Patricia Polach
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, NW
Suite 1000
Washington, D.C. 20005
Counsel for the American Federation of Musicians of the United States and Canada

Arthur J. Levine
Finnegan, Henderson, Farabow,
Garrett & Dunner, L.L.P.
1300 I Street, NW
Washington, D.C. 20005-3315
Counsel for the American Federation of Television and Radio Artists

Clifford M. Harrington
Barry H. Gottfried
Cynthia D. Greer
Shaw Pittman
2300 N Street, NW
Washington, D.C. 20037-1128
Counsel for XM Satellite Radio, Inc.

Fernando Laguarda
Susan McDonald
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
Counsel for Music Choice

L. Barry Knittel
DMX MUSIC, Inc.
11400 W. Olympic Blvd.
Suite 1100
Los Angeles, CA 90064

Ann E. Chaitovitz
National Director of Sound Recordings
AFTRA
260 Madison Avenue
New York, NY 10016

Kelly Jo MacArthur, Senior Vice President and General Counsel
Real Networks, Inc.
2601 Elliot Ave.
Seattle, WA 98121

Robert Alan Garrett
Michele J. Woods
Jule L. Sigall
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004
Of Counsel, RIAA and SoundExchange

R. Bruce Rich
Adam I. Cohen
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153

Seth D. Greenstein
McDermott, Will & Emory
600 Thirteenth Street, NW
Washington, D.C. 20005
Counsel for Yahoo! Inc.

David D. Oxenford
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037-1128
Counsel for IOMedia
Partners, Inc., et. al.

Edward K. Hahn

A

EXHIBIT A

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re:	
Determination of Statutory License Terms And Rates for New Subscription Digital Audio Services	Docket No. 2001-2 CARP DTNSRA
Adjustment of Rates and Terms for the Digital Performance of Sound Recordings	Docket No. 2001-1 CARP DSTRA 2

JOINT OPPOSITION TO REQUEST FOR CONSOLIDATION

The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and SoundExchange, an unincorporated division of the RIAA, the American Federation of Television and Radio Artists and the American Federation of Musicians of the United States and Canada (collectively, "Copyright Owners and Performers") submit the following opposition to the Petition to Convene Copyright Arbitration Royalty Panel and to Consolidate Proceedings filed by Music Choice (dated October 11, 2001) ("Music Choice Petition").

BACKGROUND

Section 114 of the Copyright Act, 17 U.S.C. § 114, establishes four distinct categories of digital transmissions that may be made pursuant to statutory license: (1) non-exempt, eligible nonsubscription transmissions; (2) transmissions made by preexisting subscription services; (3) transmissions made by preexisting satellite digital audio radio services; and (4) transmissions made by new subscription services. For each category of transmissions, reasonable rates and terms are determined either through voluntary negotiations or, if such negotiations are unsuccessful, through compulsory arbitration proceedings conducted by a Copyright Arbitration Royalty Panel ("CARP"). Section 114(f), 17 U.S.C. § 114(f), together with Chapter 8 of the Copyright Act, 17 U.S.C. § 801 *et seq.*, sets forth the procedures for requesting, convening and conducting a CARP proceeding.

According to the statutory scheme established in Section 114(f), rates for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are to be established using the four policy objectives set forth in Section 801(b)(1). See 17 U.S.C. § 114(f)(1)(B). Once established, such rates are to be adjusted at five (5)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(1)(C). In marked contrast, rates for transmissions made by non-exempt, eligible nonsubscription transmissions and new subscription services are to be established using the "willing buyer/willing seller" standard that was adopted in 1998 with the passage of the Digital Millennium Copyright Act ("DMCA"). Pub. L. No.105-304, 112 Stat. 2890 (1998); see also 17 U.S.C. § 114(f)(2)(B). Once established, the rates for non-exempt, eligible nonsubscription transmissions and new subscription services are to be adjusted at two (2)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(2)(C).

To date, two separate CARPs have been convened with respect to the Section 114 statutory license. The first CARP, which issued its report in 1997 (the "1997 CARP"), established rates and terms for preexisting subscription services for the period 1996 through 2000. See Report of the Copyright Arbitration Royalty Panel in Docket No. 96-5 DSTRA ("1997 CARP Report"). These rates and terms were extended through 2001 as part of the DMCA. The second CARP, Docket No. 2000-9 CARP DTRA 1 & 2, was convened in July 2001 and is still in the process of determining rates and terms for non-exempt, eligible nonsubscription transmissions for the periods 1998-2000 and 2001-2002 (the "Webcasting CARP"). No CARP has yet addressed the rate(s) to be paid for transmissions made either by preexisting satellite digital audio radio services or by new subscription services.

Pursuant to Section 114(f), petitions have been filed by interested parties requesting the Copyright Office to convene two CARPs – one to establish rates and terms for the statutory license for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services, Docket No. 2001-1 CARP DSTRA 2, and one to establish rates and terms for the statutory license for transmissions made by new subscription services, Docket No. 2001-2 CARP DTNSRA. Music Choice is now seeking to consolidate these two proceedings apparently for its own convenience.

As described above, the two proceedings Music Choice seeks to consolidate are governed by sharply different legal standards and are subject to rate adjustments at different intervals of time. See 17 U.S.C. §§ 114(f)(1)(B) and (C), 114(f)(2)(B) and (C). The proceedings will also involve two (arguably, three) types of services operating under very different sets of circumstances. The two types of pre-existing services have, by definition, been in existence since sometime prior to July 31, 1998. The new subscription services were not launched until sometime after that date – March 2000 in the case of Music Choice's new subscription service identified as "Backstage Pass."

The two types of preexisting services and the new subscription services also operate in very different media. All three preexisting subscription services make their transmissions via cable or satellite providers as part of television programming packages. The two preexisting satellite digital audio radio services make their transmissions directly to consumers solely via satellite to dedicated equipment such as automobile receivers. Copyright Owners and Performers reasonably believe that all of the new subscription services – including Music Choice's Backstage Pass service – make their transmissions directly to consumers via the Internet. The economics and marketplace for these businesses are each very different, including the cost structures, revenue opportunities and competition. The technologies and options they afford the listeners who receive the audio programming also differ. As a consequence, the evidence that each of these services would find it necessary to present in a CARP proceeding would be extremely different.

For the various reasons discussed above, consolidation of these two proceedings would be akin to consolidation of a Section 111 cable rate adjustment proceeding with a Section 119 satellite rate adjustment proceeding, something the Copyright Office has never done, for good reason. Although there is overlap between the parties to those proceedings and the types of copyrighted programming at issue, the vastly different rate-setting standards and statutory license intervals like those in Section 114 would make such consolidation unworkable. Compare 17 U.S.C. § 801(b)(2) (Section 111 standard) with 17 U.S.C. § 119(c)(3)(D) (Section 119 standard). Similar divisions exist between the new subscription service and preexisting subscription service statutory licenses, notwithstanding the fact that they appear in the same section of the Copyright Act.

For all of these reasons, Copyright Owners and Performers believe that consolidation of the upcoming proceedings will substantially increase the complexity of the proceedings and cause confusion and prejudice without offering any offsetting efficiencies or cost savings. Copyright Owners and Performers, therefore, urge the Copyright Office to reject Music Choice's request for consolidation.

ARGUMENT

I. MUSIC CHOICE OFFERS NO REAL SUPPORT FOR ITS REQUEST FOR CONSOLIDATION

The Music Choice Petition devotes only a single, perfunctory sentence to its request for consolidation: "Good cause exists to consolidate the two proceedings in the interest of fairness and efficiency." Music Choice cites no basis for its conclusion that "fairness and efficiency" favor consolidation nor does it anticipate or address the myriad legal and evidentiary problems that would result if its request were granted.

As the only support for its position, Music Choice cites a footnote that was included in a Copyright Office Order issued in the Webcasting CARP, a footnote that seems far more concerned with matters of timing than with matters of substance. According to the Order: "If Music Choice files a petition pursuant to section 114(f)(2)(C)(i)(I) promptly, it will be possible to establish the six month voluntary negotiation period to run concurrently, or nearly concurrently, with the voluntary negotiation period for preexisting subscription services for the 2001-2005 period, and if those negotiations are not successful, it *may* be possible to consolidate the CARP proceedings for preexisting and new subscription services." See Digital Performance

Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5, n.4 (Order dated January 2, 2001)(emphasis added).

The above suggestion, buried in a footnote in an order issued in an unrelated proceeding, can hardly be interpreted – as Music Choice would have it – as a determination by the Copyright Office that the two proceedings at issue here should be consolidated. There is no indication that the Copyright Office considered the problems associated with consolidating the two proceedings.

II. BECAUSE THE TWO PROCEEDINGS ARE GOVERNED BY SHARPLY DIFFERENT LEGAL STANDARDS, CONSOLIDATION WOULD AFFECT THE COPYRIGHT OWNERS' AND PERFORMERS' SUBSTANTIVE RIGHTS AND SUBSTANTIALLY PREJUDICE THEM

The two proceedings Music Choice seeks to consolidate are governed by sharply different legal standards. These differences, which are set forth in the express language of the statute, see 17 U.S.C. §§ 114(f)(1)(B) and (2)(B), were recently summarized by the Copyright Office:

> Section 114 of the Copyright Act contains two separate and distinct standards for setting rates and terms for the statutory license under which transmissions of sound recordings are made by means of digital audio transmissions. See, 17 U.S.C. 114(f)(1)(B) and (2)(B). Rates and terms for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are set to achieve four objectives set forth in section 801(b)(1). *These rates need not necessarily be what a willing buyer and a willing seller would negotiate in an arms-length voluntary transaction.* See, 63 FR 25394, 25399 (May 8, 1998); Recording Industry Association of Am., Inc. v. Librarian of Congress, 176 F.3d 528, 533 (D.C. Cir. 1999).
>
> The second standard for setting rates and terms was added to section 114 in 1998 when Congress expanded the statutory license to include transmissions made by non-interactive, nonsubscription services. It says that '[i]n establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly

represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.' 17 U.S.C. 114(f)(2)(B).

Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 1-2 (Order dated July 16, 2001)(emphasis added).

As the Copyright Office made clear in the above-cited Order, the differences in the applicable legal standards are substantive, not merely semantic. Indeed, when rates and terms were determined for the preexisting subscription services in 1997 under the Section 801(b)(1) standard, the panel did not attempt to establish "marketplace" rates and terms. Rather, the 1997 CARP set rates and terms based upon factors such as the financial vulnerability of the subscription services, the need to keep such services in business, the ability of future CARP proceedings to readjust rates, the promotional value of the services, and the risk such services had undertaken. See 1997 CARP Report at ¶¶ 198-201. As a result, the 1997 CARP set a "low" rate applicable to preexisting subscription services rather than a fair market value rate that would have been negotiated in a free market between a willing buyer and a willing seller. Id. ¶ 198. The 1997 CARP's reasoning for establishing a rate that did not replicate what would occur in a free market was upheld by the Copyright Office, see *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25394, 25399 (May 8, 1998), and by the D.C. Circuit. See *Recording Industry Association of Am., Inc. v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999).

In contrast to the factors that the 1997 CARP relied on to arrive at a below-market rate, the DMCA amendments to Section 114 direct a panel to establish rates for new subscription services (and for non-exempt, eligible nonsubscription services) under the "willing buyer/willing seller" standard. See 17 U.S.C. § 114(f)(2)(B) ("In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.")

Copyright Owners and Performers believe that all of the parties' right to have the evidence for each type of service considered under the appropriate legal standard will be seriously compromised if a single panel is required to hear evidence concerning two/three distinct types of services and then apply two sharply different legal standards to arrive at rates and terms for such services. Even if it is intellectually possible for a panel to apply properly two different legal standards to evidence presented to them in a single proceeding, Copyright Owners and Performers believe that, as a practical matter, arbitrators presiding over a consolidated proceeding would have a difficult time preventing the evidence submitted under one standard from affecting the rates to be established under the other standard. Moreover, the difficulty of applying the two different legal standards in one proceeding would create confusion and likely give rise to multiple objections by the parties as to whether particular evidence was relevant under a particular standard.

Where, as here, consolidation could affect the substantive rights of the parties and cause them prejudice, the Copyright Office should not exercise its consolidation authority. Cf. Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5 (Consolidation Order dated December 4, 2000)("[C]onsolidation will not affect the substantive rights of the parties to present their evidence for both time periods, nor will it cause them prejudice."); Id. at 3 (granting consolidation of the Webcasting CARPs for 1998-2000 and 2001-2002 on the grounds that consolidation was "purely a procedural matter.")

As noted above, what Music Choice has proposed with respect to consolidation would be akin to consolidating proceedings for establishing royalty rates for cable systems under Section 111 and satellite services under Section 119 because both services delivered over-the-air broadcast station signals to subscribers. The mere fact that the two statutory licenses for subscription audio services at issue here appear in the same section of the Copyright Act should not lead the Office to minimize and confuse through consolidation the clear distinctions between the legal and factual circumstances involved with each.

III. THE DIFFERENT RATE ADJUSTMENT INTERVALS WILL ADD FURTHER CONFUSION TO A CONSOLIDATED PROCEEDING

According to Section 114, the rate(s) for transmissions made by preexisting subscription services and preexisting satellite digital audio radio services are required to be adjusted at five (5)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(1)(C). By contrast, the rates for transmissions made by new subscription (and by non-exempt, eligible nonsubscription services) are required to be adjusted at two (2)-year intervals in a CARP proceeding absent agreement of the interested parties. See 17 U.S.C. § 114(f)(2)(C). While at first blush this disparity does not appear particularly relevant to the initial rate setting proceedings at issue here, it becomes clear upon closer inspection that the different adjustment intervals would add another layer of confusion and complexity to a consolidated proceeding.

The Copyright Office has not yet announced which time periods the new subscription services proceeding will cover. According to the statute, however, a CARP will be required to set an initial rate for any portion of the 1998-2000 period during which any new subscription service was operating[1], which rate will then have to be adjusted for the period 2001-2002 and for each two (2)-year period thereafter. The CARP that hears evidence concerning the preexisting subscription services and preexisting satellite digital audio radio services, on the other hand, will have two rate-setting tasks before it: (1) to adjust the rate for the preexisting subscription services that was initially set in the 1997 CARP for the period 2001-2005; and (2) to set an initial rate for preexisting satellite digital audio radio services for any portion of the period from 1996-2001 during which any such service was operating[2] and to adjust that rate for the period 2001-2005. Requiring arbitrators to receive evidence for these multiple time periods would add further confusion and complexity to a consolidated proceeding that would already be complicated by the statutory requirement to apply two different legal standards.

---

1 Copyright Owners and Performers understand that Music Choice has been operating a new subscription service since at least as early as March 2000. It is unclear whether there are other new subscription services that predate it.

2 Copyright Owners and Performers understand that XM Radio launched its service in late 2001.

IV. CONSOLIDATION WILL NOT LEAD TO ANY INCREASED EFFICIENCY; IT WILL MERELY CAUSE INCREASED COMPLEXITY AND CONFUSION

In the Webcasting CARP, the Copyright Office decided to consolidate the 1998-2000 and 2001-2002 proceedings after determining that "[c]onsolidation will avoid duplication of evidence, reduce the overall cost of the proceeding, and yield a timely established royalty fee for the 2001-2002 period." Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 5 (Consolidation Order dated December 4, 2000). Consolidation of the two proceedings at issue here will have just the opposite effect.

The preexisting subscription services/preexisting satellite digital audio radio services proceeding has only five (5) parties: AEI Music/DMX Music, Inc.; Muzak LLC; Music Choice; XM Satellite Radio, Inc.; and Sirius Satellite Radio, Inc. (collectively, the "Preexisting Services").[3] Other than Music Choice, to the best of Copyright Owners' and Performers' knowledge, none of the Preexisting Services presently offers a new subscription service. As a result, there will be no overlap – other than Music Choice – in the services involved in the two proceedings and there should be very little overlap in the evidence presented in the two proceedings. It is doubtful that even Music Choice will submit duplicative evidence given the fact that a different type of service is at issue in each proceeding.

More lack of overlap can be found by examining the media in which the various services operate. All three of the preexisting subscription services make digital audio transmissions available to the public via cable or satellite, or both, via intermediaries who offer their programming as part of larger television programming packages. Each of the preexisting satellite digital audio radio services makes digital audio transmissions available to the public solely via satellite to dedicated equipment such as automobile receivers. These two services – XM Satellite Radio and Sirius Satellite Radio – share a duopoly of FCC licenses granted for such services, which ensures that there will be no new subscription services offering satellite digital audio radio services.

By contrast, Copyright Owners and Performers reasonably believe that all services intending to participate in the new subscription services proceeding offer their services directly to listeners' general purpose computers via the Internet. Even Music Choice's new subscription service, Backstage Pass, makes digital audio transmissions via the Internet. See Music Choice Petition at 1.

These differences in delivery media and the evidence required for differentiating the rates and terms that should apply to such media will lead to further confusion, not efficiency, if the two proceedings were consolidated. In order to render a decision, the arbitrators will be forced to sort through testimony and evidence and develop a working understanding of not one or two but three separate music delivery models. Such evidence will be additive, not overlapping, and consolidating the proceedings will do nothing to streamline the evidence or eliminate any perceived duplication of evidence.

---

[3] Because these parties all had to be in existence as of July 31, 1998, this list cannot be expanded absent congressional action.

CONCLUSION

In the Webcasting CARP, the Copyright Office made clear that "[i]f, in the view of the Library, a consolidated proceeding will be so complicated and involve significantly larger amounts of testimony and evidence than a single proceeding, then consolidation is not an option." Digital Performance Right in Sound Recordings and Ephemeral Recording Rate Adjustment Proceeding, 2000-9 CARP DTRA 1 & 2 at 4 (Consolidation Order dated December 4, 2000). Given the different legal standards, the different rate adjustment intervals, the lack of overlap among the parties to the proceedings, the different delivery models and the different economic and marketplace conditions under which the various services covered by these proceedings operate, this is precisely the result that would occur if the Music Choice request were granted.

For the reasons stated above, Copyright Owners and Performers respectfully request that the Copyright Office deny Music Choice's request for consolidation. Copyright Owners and Performers further request that the Copyright Office set the dates for filing direct cases in the two proceedings currently pending before the Copyright Office.

Respectfully submitted,

AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS

By: Ann Chaitovitz / ACM
Ann Chaitovitz
AFTRA
1806 Corcoran Street, N.W.
Washington, D.C. 20009

Of Counsel:

Arthur Levine
FINNEGAN, HENDERSON,
FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005

AMERICAN FEDERATION OF
MUSICIANS

By: Patricia Polach / ACM
Patricia Polach
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Washington, D.C. 20005

RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.
on behalf of itself and SoundExchange

By: Susan Munsat
Cary H. Sherman
Steven M. Marks
Linda R. Bocchi
Susan Chertkof Munsat
Gary R. Greenstein
Recording Industry Association of
America, Inc.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-0101
Fax: (202) 775-7253

Of Counsel:

Robert Alan Garrett
Michele J. Woods
Jule L. Sigall
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004

December 20, 2001

B

EXHIBIT B

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re:	)	
Determination of Statutory License Terms And Rates for New Subscription Digital Audio Services	)	Docket No. 2001-2 CARP DTNSRA
Adjustment of Rates and Terms for the Digital Performance of Sound Recordings	)	Docket No. 2001-1 CARP DSTRA 2

COPYRIGHT OWNERS AND PERFORMERS' JOINT REPLY COMMENTS

The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and SoundExchange, an unincorporated division of the RIAA, the American Federation of Television and Radio Artists ("AFTRA") and the American Federation of Musicians of the United States and Canada ("AFM") (collectively, "Copyright Owners and Performers") submit the following Reply to (a) the Motion to Withdraw filed by Music Choice (dated December 13, 2001) ("Motion to Withdraw"), (b) the Comments of the Digital Media Association ("DiMA") (dated December 20, 2001) ("DiMA's Comments") and (c) the Joint Comments of XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") (dated December 20, 2001) ("XM/Sirius Comments").

Copyright Owners and Performers submit that the Notice of Inquiry ("NOI") dated November 20, 2001, see 66 Fed. Reg. 58180 (2001), has been rendered moot by virtue of Music Choice's Motion to Withdraw and should be withdrawn by the Copyright Office. Nevertheless, Copyright Owners and Performers are filing these Reply

Comments in order to complete the record and in the event that the Copyright Office opts to move forward with the NOI, notwithstanding the filing of the Motion to Withdraw.

As stated in Copyright Owners and Performers' Joint Opposition to Request for Consolidation (dated December 20, 2001) ("Joint Opposition"), Copyright Owners and Performers believe that consolidation of the above-referenced proceedings will substantially increase the complexity of the proceedings and cause confusion and prejudice without offering any offsetting efficiencies or cost savings. XM and Sirius raise the identical concerns in their joint comments and, like Copyright Owners and Performers, urge the Copyright Office to reject the now withdrawn request for consolidation.

The only comments filed in support of the request for consolidation were submitted by DiMA, a non-party to the proceedings, on behalf of various unnamed member companies. As described more fully below, Copyright Owners and Performers find DiMA's Comments to be both inaccurate and unpersuasive. Accordingly, Copyright Owners and Performers urge the Copyright Office to disregard DiMA's Comments and reject Music Choice's withdrawn request for consolidation.

DISCUSSION

I. MUSIC CHOICE'S REQUEST FOR CONSOLIDATION IS NOW MOOT

On October 11, 2001, Music Choice filed a Petition to Convene Copyright Arbitration Royalty Panel and to Consolidate Proceedings ("Petition to Consolidate"). Based on this petition, the Copyright Office published the NOI seeking comments on whether the rate adjustment proceeding to determine reasonable rates and terms for the public performance of sound recordings by new subscription services should be consolidated with the rate adjustment proceeding to determine reasonable rates and terms for the public performance of sound recordings by pre-existing satellite digital audio radio services and pre-existing subscription services.

On December 13, 2001, Music Choice filed a motion seeking to withdraw its Petition to Consolidate. In the Motion to Withdraw, Music Choice indicated that it planned to discontinue its new subscription service, Backstage Pass, as of January 2, 2002 and saw no further reason to seek a consolidated proceeding. As a result, Music Choice's Petition for Consolidation is now moot and the Copyright Office should withdraw the NOI. In the alternative, the Copyright Office should reject the Petition for Consolidation without giving it any further consideration.

II. THERE IS NO OVERLAP AMONG THE PARTIES TO THE PROCEEDINGS

All parties intending to participate in either of the above-captioned proceedings were required to file a Notice of Intent to Participate ("Notice") not later than December 20, 2001. A thorough review of these Notices revealed that, following Music Choice's decision to withdraw from the new subscription proceeding, there is absolutely no overlap among the parties to the two proceedings other than the Copyright Owners and Performers. To wit, the parties to Docket No. 2001-1 CARP DSTRA 2 are as follows: RIAA, AFTRA, AFM, XM, Sirius, Music Choice and DMX/AEI Music. The parties to Docket No. 2001-2 CARP DTNSRA are as follows: RIAA, AFTRA, AFM, Yahoo! Inc. and RealNetworks, Inc. Given this, there can be no argument that any entity (other than the Copyright Owners and Performers) will be forced to bear the cost of participating in multiple proceedings.

III. DIMA'S COMMENTS ARE CONTRARY TO FACT AND WERE SUBMITTED ON BEHALF OF UNIDENTIFIED MEMBERS

A. DiMA's Comments Should be Given Little or No Weight Because DiMA is Not a Party to the Proceedings at Issue

Although DiMA chose to file Comments supporting consolidation, it did not choose to file a Notice of Intent to Participate in either of the proceedings that are the subject of the NOI. Thus, DiMA is not a party to either of these proceedings. Even if this does not technically disqualify DiMA from filing comments, it should be required to reveal the identity of its members and/or to state which of them has a putative interest in the consolidation of the proceedings at issue here, neither of which DiMA's Comments do. In view of these deficits, the DiMA Comments should be given little or no weight by the Copyright Office.

B. Contrary to DiMA's Assertions, Consolidation Will Not Avoid Duplication of Evidence Nor Will it Save Time or Money

Although DiMA's Comments purport to make four separate arguments against consolidation, its arguments all boil down to one single point – that, in DiMA's view, consolidation would be more efficient and save money. While separate proceedings will undoubtedly give rise to a modicum of duplicative evidence, because of the pervasive differences in the nature of the services at issue in these proceedings and their respective markets, the overwhelming majority of the witnesses and evidence that will be presented in each proceeding will be different, not the same. As shown below, DiMA's claims to the contrary simply do not withstand scrutiny.

First, as discussed above, the Notices of Intent to Participate reveal no overlap among the parties to the two proceedings. Accordingly, no party (other than Copyright

Owners and Performers) will be forced to bear the cost of participating in multiple proceedings, despite DiMA's attempt to suggest otherwise.

Second, DiMA's Comments gloss over the numerous and fundamental differences between the three groups of services involved in these proceedings: pre-existing subscription services that provide their programming as a value-added service through cable and satellite television systems, pre-existing satellite digital audio radio services that provide their programming via satellite to dedicated hardware devices pursuant to special FCC-licenses and new subscription services that apparently provide their programming to general purpose computers via the Internet. Not only do the three groups of services deliver their programming through different media to different end users who use different equipment to receive the programming, they also operate in completely different markets, with different price and cost structures, different competitors and different business models.

All of these differences will necessitate a host of non-overlapping expert and fact witnesses tasked with the job of educating the arbitrators about the various technological and business issues confronting the three groups of services. It is simply not the case, as DiMA alleges, that "the parties in each arbitration will be presenting a substantial volume of common evidence." DiMA Comments at 1. Nor is it the case that "witnesses from these [different] services might be called to testify in more than one proceeding," DiMA Comments at 1, or that "witnesses from one type of service" might have "information [that] remains relevant" in a proceeding where the witnesses' "service is not implicated," DiMA Comments at 1-2.

Copyright Owners and Performers agree with DiMA that "expert witnesses will be required to prepare and analyze the market for all of these services." DiMA

Comments at 2. However, Copyright Owners and Performers fail to see how it would be any more efficient to have expert witnesses analyze these three disparate groups of services – effectively sub-industries – in one proceeding as opposed to two. DiMA's Comments cite no evidence that the services operate in overlapping or similar markets. Moreover, even assuming that each side chose to use a single expert to analyze the markets for all of the services at issue in these proceedings, that expert would have to prepare what amounts to three separate reports (even if submitted under one cover) and give direct testimony and be subject to cross examination about three separate sub-industries, regardless of whether there is one proceeding or two.

Third, even if DiMA were right about the services' need to present some overlapping testimony in the two proceedings, there are certain procedural measures available that would allow DiMA's members to do this inexpensively and efficiently. For example, DiMA members could take advantage of Copyright Office rules that permit parties to any given Copyright Arbitration Royalty Panel ("CARP") to introduce evidence presented in one or more previous CARPs simply by designating relevant testimony from past records. See 37 C.F.R. §251.43(c) & 251.48(a).

Fourth, DiMA's Comments fail to address the substantial differences in the legal standards the arbitrators will be required to apply in the two proceedings and entirely overlook the fact that the parties will be required to present different types of evidence under each of the legal standards. As described more fully in Copyright Owners and Performers' Joint Opposition, these differences will make a consolidated proceeding far more complicated and confusing than two separate proceedings. In addition, these differences make it likely that a consolidated proceeding will result in prejudice to one or more of the parties.

IV. XM AND SIRIUS AGREE THAT CONSOLIDATION IS INAPPROPRIATE

According to the XM/Sirius Comments, XM and Sirius "oppose the inclusion of any new subscription services in the Pre-existing Services CARP and also oppose consolidation of any New Subscription Services CARP with the upcoming Pre-existing Services CARP. There is a substantial risk that consolidation would cause unnecessary confusion and complexity in a proceeding that is already likely to be confusing and complex." XM/Sirius Comments at 2.

XM and Sirius base their opposition on the same factors cited in the Copyright Owners and Performers' Joint Opposition, namely, that the two proceedings are governed by very different legal standards, that the rates at issue are subject to adjustment at different time intervals and that the services at issue in the two proceedings are so different as to make substantial additional evidence, particularly expert testimony, necessary in a consolidated proceeding.

CONCLUSION

Copyright Owners and Performers submit that the Copyright Office should either withdraw the NOI or reject Music Choice's request for consolidation on the ground that Music Choice's Motion to Withdraw (dated December 13, 2001) rendered its original request moot. In the event that the Copyright Office rejects this argument, Copyright Owners and Performers urge the Copyright Office to reject the request for consolidation for all of the reasons set forth above and for the reasons set forth more fully in the Copyright Owners and Performers' Joint Opposition to Request for Consolidation (dated December 20, 2001) and in the Joint Comments of XM Satellite Radio, Inc. and Sirius Satellite Radio Inc. (dated December 20, 2001).

Respectfully submitted,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

By: Ann Chaitovitz / ACM

Ann Chaitovitz
National Director of Sound Recordings
AFTRA
1806 Corcoran Street, N.W.
Washington, D.C. 20009
(202) 234-8194
Fax: (202) 234-7586

Arthur Levine / ACM

Arthur Levine
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000
Fax: (202) 408-4400

AMERICAN FEDERATION OF MUSICIANS

By: Patricia Polach / ACM

Patricia Polach
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-2600
Fax: (202) 842-1888

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
on behalf of itself and SoundExchange

By: Susan Munsat

Cary H. Sherman
Steven M. Marks
Susan Chertkof Munsat
Gary R. Greenstein
Recording Industry Association of America, Inc.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-0101
Fax: (202) 775-7253

Of Counsel:

Robert Alan Garrett
Michele J. Woods
Jule L. Sigall
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Fax: (202) 942-5999

January 22, 2002